



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 120617/2023

In the matter between:

PENTHOUSE HOLDINGS (PTY) LTD

Applicant

and

DELETE WHICHEVER IS NOT
APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES:
NO
(3) REVISED

**SANDIRAN
NAIDOO**

JASON
Respondent

JUDGMENT

NGALWANA AJ

[1] This is an application for an anti-spoliation order. The Applicant, a building contractor, wants its full access to, and possession of, a building site restored immediately to it. It approaches this court on an urgent basis and claims costs on attorney and client scale.

[2] The Respondent, the owner of the site, says the application is not urgent and whatever urgency there may be is self-created. He says the high-watermark of the Applicant's claim to urgency is a purported builders' lien which, he says, the Applicant had in any event waived. The Applicant denies that it waived the builders' lien and submits that its director (Mr Chinyama, the deponent) never signed the waiver agreement that the Respondent puts up under oath from a firm of attorneys appointed by the bank to register the building loan, and what appears to be email correspondence to that effect between a conveyancer from the firm and Mr Chinyama.

[3] Counsel also addressed me on the merits of the case. I am grateful to them both for their able and scholarly address. However, it is unnecessary to engage with the merits of the Applicant's case for I am satisfied that its application falters at the first hurdle in urgent court: urgency.

[4] The Applicant's basis for urgency is captured in at least two submissions in its founding affidavit. Mindful that for urgency he must satisfy this court that the Applicant cannot obtain substantial redress in due course if the order he seeks were not granted now, Mr Chinyama says, in paragraph 58: *"If this matter were to be heard on the ordinary court rolls, the applicant would lose its lien, which secures its right to be paid for work undertaken..."*. In paragraph 60 he says: *"The applicant has invested money in the construction site and it stands to be prejudiced if it cannot rely on a lien in order to claim what it has invested"*.

[5] It is therefore clear that the Applicant's claim to urgency hinges on a builder's lien. The Respondent has put up evidence of the Applicant's waiver of that lien. The Applicant disputes the

evidence. That is a factual dispute that an urgent court cannot resolve on the papers. Motion court is about the resolution of legal disputes on common cause facts. Where *bona fide* disputes of fact, not previously foreseen, arise in the course of the exchange of pleadings in motion court proceedings, the motion court judge may refer those factual disputes to oral evidence. In this case, that would require the calling of the building loan registration firm whose conveyancer deposed to an affidavit claiming that Mr Chinyama had indeed signed a waiver of the builder's lien. It may even require the calling of a handwriting expert to give evidence on the authenticity of Mr Chinyama's signature on the waiver agreement. Counsel did not suggest that either of these were present in court at the hearing of the matter. In any event, when disputes of fact arising in motion proceedings are referred for oral evidence, the usual practice is for the Applicant to file a declaration which will serve as founding papers, and for the Respondent to file a response. That new set of papers would then serve as the pleadings record. That is not the stuff of which urgent court is made.

[6] In any event, the Applicant has intimated that it intends seeking relief against the Respondent for payment for work done. The Respondent claims that he has in fact overpaid the Applicant, while the Applicant claims he is still owed money by the Respondent for the renovation work done at the Respondent's property. If the Applicant should be successful in those mooted proceedings, then it should recoup its investment into the project. If it should not succeed, well then it would not have been entitled to the order that it now seeks. It is not for the urgent court to anticipate the outcome of those proceedings by granting an anti-spoliation order.

[7] The Respondent has asked for costs on a punitive scale. It says the Applicant puts up “*no facts*” to justify urgency. I do not agree. The Applicant says the Respondent informed him that he intends selling the property that the Applicant has built on the construction site over which he says he enjoys a builder’s lien, and that once the property has been sold, the Applicant will lose the protection afforded by the builder’s lien. But this engages the same dispute of fact about whether the lien was waived. This court, sitting as an urgent court, cannot resolve that dispute for reasons already given. The serious allegation, essentially of fraud, made by the Applicant against a firm of attorneys appointed by the bank to register the building loan – and by extension against the Respondent – would require a deep dive into factual and expert evidence before making an assessment on the appropriateness of a costs order on the scale requested. The urgent court is not equipped for that.

Order

In the result, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. The Applicant is to pay the Respondent's costs on the ordinary scale, including costs consequent upon the appointment of Counsel.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2023.

Date of hearing: 29 November 2023

Date of judgment: 04 December 2023

Appearances:

Attorneys for the Applicant:

Machaba Attorneys

Counsel for the Applicant:

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